Testimony to the House Labor Committee
on
House Resolution 21, The Employee Free Choice Act

March 6, 2007 • 9 a.m. • Room 307 of the House Office Building

Good morning Mister Chair and members of the Committee. My name is Chris Heaphy and I am the Senior Vice President, General Counsel and Secretary of The Taubman Company LLC.

The Taubman Company is a real estate development and management company employing over 599 people. We own and/or operate 23 regional and super regional shopping centers in Michigan and 10 other states. The Taubman Company has been based in Michigan since it was founded over 50 years ago. We operate three major shopping centers in Michigan (Twelve Oaks in Novi, Great Lakes Crossing in Auburn Hills, and Fairlane Town Center in Dearborn). We are also constructing The Mall at Partridge Creek in Clinton Township which is schedule to open this fall. Our current construction projects in Michigan total over $200,000,000.

I want to thank you for the opportunity to testify before you today regarding our opposition to H.R. 21, the Resolution to memorialize Congress to enact the Employee Free Choice Act (HR 800). This issue is of great concern for The Taubman Company.

I. The Proposed Law

- The Employee Free Choice Act ("Act") would eliminate the employees' democratic right to vote in a secret ballot election on the issue of union representation.

- Section 2 of the Act would require that if a union obtains signed authorization cards from a majority of the employees, the employer would have to recognize the union as the "exclusive

bargaining representative" of all the employees in the bargaining unit.

II. This Law Should not be Enacted Because the Current System is not Broken

- Deciding whether or not to support a union seeking recognition is among one of the most important workplace decisions an employee may ever have to make. Today, the most common method for determining whether or not employees want a union to represent them is a private ballot election overseen by the National Labor Relations Board (NLRB). The NLRB provides detailed procedures that ensure a timely[1] and fair election, free of fraud, where employees may cast their votes confidentially without peer pressure or coercion from unions or employers.

- Secret ballot elections have been the preferred method for determining employee support for a union throughout the 70-year history of the National Labor Relations Act.

- The reason this new law is being proposed is not a problem with the current system but rather the labor unions' 50-year trend of declining membership and their failure to reverse that decline by organizing enough new members to offset their membership losses. This has been caused by may factors, chief among them the loss of manufacturing jobs to other markets. There is no evidence to

[1] In FY '06, 94.2% of all initial representation elections were conducted within 56 days of filing. The median time to proceed to election from the filing of a petition was 39 days.

suggest that a system that has worked for over 70 years[2] suddenly no longer works.

- The Act is not needed because of employer violations of the law during union organizing campaigns:
  - Employers generally want to oppose unionization both aggressively and lawfully.
  - Most employers conduct lawful campaigns before a union representation election.
  - Some employers act inappropriately during union organizing campaigns, but the NLRB already has a wide range of remedies, specifically including a second election, a bargaining order, and reinstatement with back pay of unlawfully discharged employees.
  - The fact that some employers, like some unions, do not play fair in union organizing campaigns does not justify disenfranchising the employees who will be affected by the consequences of unionization. The cure of disenfranchisement is worse than the alleged disease of employer campaign violations.

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[2] The NLRB's election process is neither slow nor ineffective:

- The overwhelming majority of petitions for a union representation election result in elections within 56 days (92.5% in FY 2003).
- The median time from the filing of a representation election petition to an election is approximately 6 weeks (40 days in FY 2003).
- Unions win over 50% of all NLRB secret ballot representation elections in which employees decide whether or not to select a union. That percentage has been relatively constant for 40 years:
  - 1965 – 61.8%
  - 1975 – 50.4%
  - 1985 – 48%
  - 1995 – 50.9%
  - 2004 – 58.6%

These statistics show both that the NLRB's election process does not strongly favor employers and also that secret ballot representation elections are not why union membership has declined for over 50 years.

• Federal courts have repeatedly explained that secret ballot elections are a far more reliable method of determining employee support for a union than signed union cards[3].

• Despite the fact that secret ballot elections have long been recognized as the preferred method for determining representation questions by the Courts and others, sadly, the US House of Representatives passed legislation just last week to elevate the card check process to the principal method of recognizing a union, thereby eliminating employees' long-standing right to secret ballot elections.[4]

III. Problems with the Proposed Law

• Employees often sign union authorization cards for reasons other than to support a union, including to avoid peer and union pressure, coercion, and intimidation. Employees have in the past signed union cards before they knew what selecting a union would entail. Then, in the privacy of a secret ballot election, employees who initially signed union cards often vote against union representation.

• The Act would promote peer and union pressure and intimidation as organizing tactics by taking away the employees' ability to vote in a later secret ballot election.

In NLRB v. Village IX, Inc., 723 F.2d 1360, 1371 (7th Cir. 1983), the Seventh Circuit noted that "[w]orkers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing...".

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[3] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) (A secret ballot election is the "most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support," and signed union cards are "admittedly inferior to the election process").

NLRB v. S.S. Logan Packing Corp., 386 F.2d 562, 565 (4th Cir. 1967) ("It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check'...").

[4] H.R. 800, The Employee Free Choice Act, passed the US House on March 1, 2007 by a vote of 241 to 185.

- Because employees sign union cards for reasons other than a desire to have a union become their "exclusive collective bargaining representative," the Act would result in recognition for a union based on signed cards that do not necessarily mean that the union really has majority support, even if it acquired signed cards from a majority of employees.

- This results in an artificial increase in union membership—artificial in the sense that it does not reflect the views of the majority of workers. But this will create real problems – a business that does not want a union will be operated by union workers even though a majority of the workers don't want to be in the union.

- Because of the importance and, usually, the permanence of a decision to select a union, the employees' right to vote in a secret ballot election should be legally protected, not legally abolished.

- Think about how this plays out. A union organizer presents one side of the story to employees and obtains signatures on a card—not all at one time but over a period of time and under a variety of circumstances. The only information presented is one-sided. The employer does not have the opportunity to rebut what is being said or to tell the other side of the story.

IV. The Taubman Company Opposes the Proposed law

The Act is an unwise and unnecessary change. The Taubman Company opposes the Employee Free Choice Act for other, business-related reasons:

- The expense of dealing with a union organizing campaign.
- The additional expenses associated with negotiating and administering a collective bargaining agreement.
- The potentially negative effect on our competitiveness compared to other operators of regional malls that are not unionized.
- The potentially negative effect on job growth in our company.

- And, the potential disruption of our tenants' businesses and our customers' shopping experiences by picket lines, handbilling, and work stoppages.

In closing, I ask you to consider this. If House members could be recalled by simply obtaining recall cards and not having a recall election, would you think that was fair? Would it be fair to allow your political foe the ability to pull you from office by obtaining, in private and in secret, and by proving whatever information or misinformation the person desired, signed cards from 50% of your constituents without having an election? When you consider this resolution I ask you to consider why, if private ballots were good enough for your constituents when they elected you to public office, why they wouldn't be good enough for workplace elections too. It is hard to think of a more fundamental right of Americans – the right to vote in private and to have the majority view prevail.

Thank you again for your time this morning. I'd be happy to answer any questions you may have.

US House of Representatives Passes Bill Giving Unions Extraordinary Power and Denying Employers and Employees the Right to an Election

By Craig M. Stanley, with Robert A. Boonin

The United States House of Representatives just granted organized labor its first and most far-reaching wish. On March 1, 2007, by a vote of 241 to 185, the House passed the Employee Free Choice Act (EFCA) of 2007. Despite its appealing title, EFCA actually stifles employee choice on whether to unionize—it also stifles meaningful employer freedom of speech. EFCA would, among other things, REQUIRE employers to recognize unions based solely on evidence of majority support, such as signed cards. No secret ballot election. No right for employees to hear other points of view after signing cards indicating an interest in a union. No right for employees to discuss the issues among themselves. No right for employers to talk to their employees and present the employer's point of view.

EFCA has been a key priority for organized labor and was fast-tracked by the Democratic House leadership. EFCA was introduced on February 5 by George Miller, Chairman of the House Education and Labor Committee, and a hearing was held just three days later. The bill's supporters and union witnesses controlled the hearing. Less than a week later, the Education and Labor Committee met to consider EFCA. After rejecting several amendments, the committee passed the bill 26 to 19. The House expedited debate on the bill and heard only three amendments. One of the rejected amendments would have allowed employees to decertify its union based on the same card-check procedure recognized in the bill for representation elections. Accordingly, under the current bill, a union would be "voted-in" based solely on a card-check, yet a union could be voted out only through the traditional National Labor Relations Board secret ballot vote process.

Under current law, employers have the right (i.e., they may choose) to recognize a union based on a card-check; however, employers rarely do so. Employers and employees also have the right to require a majority support showing through the traditional NLRB-conducted secret ballot election. Under EFCA, employers would be forced to recognize a union based solely on a card-check showing majority "support" for the union. Obviously, it is considerably easier for unions, through a variety of methods, to convince employees to sign cards than it is for them ultimately to convince employees to vote for the union in a secret ballot election.

EFCA has other significant implications as well. It would compel arbitration in an initial collective bargaining negotiation if the parties fail to reach an agreement within 90 days. The Federal Mediation and Conciliation Service would first attempt to mediate the dispute. If mediation is unsuccessful, the dispute would be submitted to a panel of arbitrators who could render a decision (i.e., draft a contract) that would bind the parties for two years. Under current law, the parties do not have to reach an initial agreement. They must only meet and confer in good faith. If parties fail to

reach an agreement, the employees again have the right to choose whether to have the union represent them.

Finally, organized labor has long complained that NLRB penalties for employers and remedies for unions and employees are insufficient to deter employers from unlawful conduct. EFCA would expedite NLRB processing of unfair labor charges filed during an organizing campaign and also considerably increase employer monetary penalties.

EFCA has a long way to go before becoming law. The Senate likely will prevent, through a filibuster, EFCA from even coming to a vote. EFCA's supporters would have to garner 60 votes to break the filibuster. Even if organized labor is successful enough to break the filibuster, the President would still have to sign the legislation. However, the White House announced on March 1st that President Bush would veto the bill.

EFCA will no doubt become a key 2008 campaign issue, and could find more favor with the next Congress and President. Until then, Congress likely will attempt to revise the bill to attract the necessary support.

With passage of this or a related bill possible, employers concerned with unionization should intensify their focus on proactive and preemptive supervisory and positive climate training and employee communication programs. Employers should also work with supportive politicians and business groups and associations to make sure their collective voice is heard.

For more information, contact the author at stanley@butzel.com, or any attorney in Butzel Long's Labor and Employment Law Practice Group. Updates on the bill can be found at the firm's website, www.butzel.com.

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Good Morning. My name is Donald Scharg and I wish to thank the Committee for this opportunity to appear before you and testify on the Resolution before your regarding our opposition to H.R. 21, the Resolution to memorialize Congress to enact the Employee Free Choice Act (HR 800) because of problems with the proposed legislation.

I am a principal in The Fishman Group in Bloomfield Hills, and for the last 27 years we have concentrated our practice to representing employers both inside and outside the State of Michigan in their labor and employment matters. Between my partner, Steven Fishman and myself, we have over 65 years of experience in the field of labor law and labor relations. We have represented our employer clients in responding to organizing drives and collective bargaining involving many of the unions here today and covering the whole gamut of the alphabet of unions: IBT, UAW, IAM, UFCW, IBEW, SEIU, and the list could go on. Based on our experience we are uniquely qualified to speak to the Resolution and urge the Committee not to support the Employee Free Choice Act of 2007.

To start, the name of the legislation raises questions about the honesty of its goal. This country was built on the foundations of democracy, after an examination of the issues and hearing the positions of both sides, an election where voters have the opportunity in a secret ballot, to cast a vote. We all agree with the basic, bedrock principle of one person, one vote, in a secret government protected election. The members of this Committee were selected through this process. This principle has also been the cornerstone of our industrial democracy. That is the American way.

Why seek to change it now? Because unions in general refuse to accept the blame for any of their failures to maintain or build membership. Instead, union have sought, and continue to seek, political solutions which guarantee their survival. Basing choice on a signed card is just such hope.

The Employee Free Choice Act, in a feat of Orwellian doublespeak, sets that important principle on its head. This bill takes away employee free choice and industrial democracy, eliminating 70 years of a careful brilliant balance crafted by Congress, and replaces the protected election process with unprotected card-signing pressure.

Employees sign union cards for a variety of reasons. Some employees think they want a union. Some don't like their supervisor. Some don't like their fellow employees. Some are curious. Some sign cards just to go along with the crowd. And, some are pressured, threatened, intimidated by union organizers or other employees to sign a card. Employees are subject to

home visits, misrepresentations, false statements, threats, vandalism, intimidation, coercion, ostracization - pressure to get on the band wagon or be left out.

Signed cards have been important in obtaining an election in the process we now have. With this proposed legislation, signed cards means the difference between recognition of the union and not. Imagine the pressure on employees.

Proving threats, vandalism, intimidation, coercion, even peer pressure, is difficult and is contingent on the victim of the intimation coming forward. Of course, as you can expect, most victims of intimidation are not going to come forward and complain, especially when they are surrounded by co-workers who are pushing the union. Establishing improper conduct in the solicitation of union cards behind closed doors is an extremely difficult task. If by chance, someone does come forward, are we going to have hearings and appeals on the intimidation?

What sponsors of the revised procedure are purposely not saying is that forcing employer recognition based solely on certification of a signed card majority will dramatically increase the union win rate. Our neighbors across the border, Ontario, in 1995 moved from forced recognition based on signed cards to the election process. There was a negative impact on the success of unions with the change. But the secret ballot election was ultimately determined in Ontario to be more reflective of the true wishes of employees.

And, there is one little secret that probably has not been mentioned in the debate which is that it is not against the labor laws for employees pushing the union to use misrepresentations, false statements, threats, vandalism, intimidation, and ostracization to pressure other employees to sign union cards. Nor is it against the labor laws for unions to make misrepresentations to the employees they are seeking to organize. Union cards are not a reliable method to gauge employee support for a union. Seventy years of NLRB experience confirms that industrial democracy is best served by NLRB supervised secret-ballot elections.

As the agency responsible for carrying out national labor policy, the National Labor Relations Board has repeatedly acknowledged that "...the secret-ballot election remains the best method for determining whether employees desire union representation. In such an election, employees cast a secret vote under laboratory conditions and under the supervision of a Board agent. By contrast, a card-signing guarantees none of these protections." ***Dana Corporation***, 341 NLRB 1283 (2004).

I am also here to speak to Section 3 of the Employee Free Choice Act which is entitled, "Facilitating Initial Collective Bargaining Agreements". Under Section 3, if the union and employer do not reach a first contract within a short 90 days, a mediator can be requested and appointed. If no contract is reached within the next 30 days, an arbitration panel will be appointed by the Federal Mediator and Conciliation Service to impose a two year labor contract on the parties. Section 3 attempts to impose labor contracts by taking away from both sides, the freedom to make business decisions and to contract. This is simply, bad public policy.

This imposition of contract terms is contrary to American labor law as explained by the

United States Supreme Court in ***H. K. Porter Co. v. N. L. R. B.***, 397 U.S. 99, 103-104 (1970):

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions...But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

Without an agreement, the employer is compelled to submit the bargaining dispute to binding arbitration, decided by an uninvolved 3rd party arbitrator, who will set the terms and conditions of the new labor contract. Labor relations professionals acknowledge that first contracts typically take longer to achieve, with several months not being unusual. This is because the labor contract fabric as well as the economics have to be resolved. Breakdowns may occur over such issues as the employer's right to manage the business, the rules governing operations, and the level necessary to provide market-competitive pay and benefits.

Under the proposed change, employers would have to accept the decision of a 3rd party arbitrator on these subjects. Not unlike the State's Public Act 312 process, soundly criticized by the State's public sector employers, the interest arbitrator will decide the terms and conditions of the new labor contract. Cumbersome, expensive, subject to manipulation, parties are encouraged to take more extreme positions then they would otherwise, in good faith take, relying on mandatory arbitration as the safety net.

Rather than promote the bargaining toward agreement, the binding arbitration system encourages disagreement, the precondition to arbitration, a political cover for the less courageous participant. Issues are raised late in the process to posture for the arbitration win, rather than move toward settlement. There are many significant pitfalls in binding arbitration, including the expense of the process, with the result that employers may be left unable to compete in the marketplace, shedding more jobs in the process.

Voluntary unionization and freedom of choice has been at the core of the U.S. labor policy, established in 1935 when Congress passed the National Labor Relations Act. Congress provided that employees would have the right to support or reject unions in NLRB conducted secrete-ballot elections. If employees freely chose to support a union, Congress intended that the exercise if self-help in the following collective bargaining would be unregulated and left to the free play of economic forces.

This carefully struck balance of bargaining power established by this national labor policy was designed to permit employers and unions to successfully deal with changing conditions, without government or 3rd part intervention. Any loss of bargaining freedom through this forced choice bill would artificially force employers to become uncompetitive, and risk further losses and layoffs. Something Michigan can ill afford.

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I would like to thank Chairman Miller and the rest of the Labor Committee for allowing me this opportunity to testify on House Resolution 21. I would also like to thank Chairman Miller for introducing and sponsoring this resolution that is vital to preserving not only the labor movement, but also, our country's middle class. My name is Cynthia Ann Paul and I am the legislative Director for the Service Employees International Union (SEIU) here in the state of Michigan. Today, I am testifying on behalf of our 78,000 members here in Michigan as well as our 1.8 million members across the United States and thousands of unorganized workers who would like to have a voice in their workplace and to be able to negotiate their wages and benefits.

SEIU supports House Resolution 21, which memorializes the United States Congress to enact the "Employee Free Choice Act" (HR 800). SEIU believes that HR 800 are much needed changes to the National Labor Relations Act (NLRA) to hold anti-union employers accountable; guarantee employees a fair and free chance to form a union; and force employers to stop dragging out contract negotiations. The Central purpose of the Employee Free Choice Act (EFCA) is to create an atmosphere where workers are truly free to choose a union without employer coercion, interference and retaliation. This is done through the following changes to the NLRA:

1) Allowing representation when a majority of workers sign authorization cards;
2) Providing for first contract mediation and arbitration; and
3) Enhancing the penalties for employers that do coerce, discriminate and interfere with employees trying to organize and/or get a first contract.

Section 7 of the NLRA states "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." [1] Unfortunately, over the last three decades employers have become increasingly bold in violating employees' rights under the law and the NLRB election process. The NLRB's election process was developed at a

[1] Senator Wagner (the author of the NLRA) saw the NLRA as a weapon against the Depression, which he attributed to under consumption caused by too unequal a distribution of wealth. Collective bargaining he thought, would both restore an element of fairness and industrial democracy to the workplace, and redistribute wealth in such a way as to reinvigorate the economy.

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time when employer hostility to collective bargaining was much less vehement. In the 1950's and 1060's, employers did not routinely engage in massive legal and illegal violation of employee rights. Today, union elections are often the focus of employer campaigns of intimidation, discrimination and coercion. In fact, employers illegally fire employees for their union activity in at least 25% of all organizing efforts, 70% of employers in the manufacturing sector threaten to relocate their facilities and 91% force employees to attend one-on-one anti-union meetings with their supervisors. Every year nearly 23,000 workers lose their wages and jobs for exercising their freedom to associate and rights under the NLRA.

The EFCA attempts to remedy the above grave injustice by allowing for certification of a union as the bargaining representative if the National Labor Relations Board (NLRB) finds that a majority of employees in an appropriate bargaining unit have signed authorization cards. It is important to note, EFCA does not a mandate this procedure, and if the employees wish, they can go through an election. This ultimate decision is placed in the hands of the workers and not employers. It further requires the NLRB to develop model authorization language and procedures for establishing the validity of signed authorizations.

Even after unions organize workplaces there are many instances they are faced with an uncooperative employers who drag their feet and/or refuse to negotiate. In fact, 50% of workers who choose to unionize still do not have a contract within two years after choosing a union. In an attempt to remedy this EFCA provides that if the parties do not reach a contract within 90 days, either one can seek mediation from the Federal Mediation and Conciliation Service (FMCS). If there is no agreement after 30-days of mediation, the dispute will go to arbitration, the result of which will bind the parties for two years.

The EFCA additionally provides much needed employee protection by enhancing the penalties for employer discrimination, coercion and interference when employees are trying to organize or get a first contract. Employers fire pro-union workers in 25% of all organizing drives, but the remedies under the NLRA are inadequate to act as a deterrent to employers. Many times employees spend years proving his or her case only to be eligible to receive back pay and reinstatement. The EFCA attempts to remedy this situation by providing for the following penalty enhancements:

- It allows the NLRB to go to court in order to get a injunction (an order stopping) an employer from firing or discriminating against workers based upon their union activity;
- It allows for treble back pay damages. I.e., if an employer is found to have discriminated against a workers because of their union activity, the employer must pay three times their back pay; and

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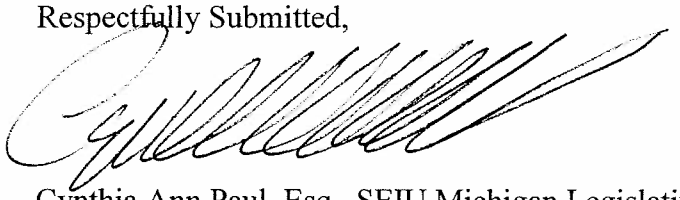
- It provides $20,000 in civil fine for employers who willfully or repeatedly violate workers' rights.

The EFCA gives workers the freedom and ability to negotiate for better terms from their employers. It also takes important steps towards strengthening and preserving America's middle class. That is why a majority of Americans support it[2], and that is why today I urge you and all of your colleagues to do the same. Once again, thank you for allowing me this opportunity to testify.

Respectfully Submitted,



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[2] Seventy-seven percent of Americans support strong laws that give employees the freedom to make their own choice about whether to have a union in their workplace without interference from management.